Office - Supreme Court, U.S.
FILED
SEP 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1666

In the

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN R. LARSON, Commissioner of Securities, Minnesota Department of Commerce; WARREN SPANNAUS, Minnesota Attorney General; Individually and in their official capacities,

Appellants,

vs.

PAMELA VALENTE, LARRY BARBER, LARRY HAFT, KIMBERLY KORMAN, and HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY,

Appellees.

On Appeal from the
United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF APPELLEES

ROBERT L. TOMS
611 West Sixth Street
Los Angeles, CA 90017
Tel: (213) 628-1300
Attorney for Amicus Curiae

Of Counsel:
THOMAS S. BRANDON, JR.
General Counsel
Center for Law and Religious Freedom
Post Office Box 2069
Oak Park, IL 60303
Tel: (312) 848-7735

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Brief of the Center for Law and Religious Freedom of the Christian Legal Society in Support of Appellees .. 1

Interest of Amicus Curiae 2

Statement of the Case 3

Argument 4

I. THE CLASSIFICATION OF RELIGIOUS GROUPS IN THE MINNESOTA CHARITABLE SOLICITATIONS ACT CONSTITUTES INVIDIOUS DISCRIMINATION VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AND THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT REGARDLESS OF THE UNDERLYING INTENT OF THE MINNESOTA LEGISLATURE OR THE EFFECT OF THE SAID ACT 4

A. The Equal Protection Clause Of The Fourteenth Amendment Is Applicable To All State Action 4

B. The Minnesota Charitable Solicitations Act Intrudes Upon A Fundamental Right Thus Making It Appropriate To Apply Strict Equal Protection Standards 5

C. A Compelling State Interest Is Required In Order To Uphold A Statute Which Is Violative Of The Equal Protection Clause When Fundamental Rights Are Involved 10

PAGE

D. Government Is Required To Be Neutral In All Respects When Dealing With First Amendment Religious Freedoms In Order To Withstand A Challenge Of Violation Of Both The Equal Protection Clause And The Establishment Clause 13

II. ONCE IT HAS BEEN DEMONSTRATED THAT AN EXEMPTION TO A STATUTE HAS BEEN FOUND TO BE UNCONSTITUTIONAL, THE COURT MUST DECIDE THE APPLICABILITY OF THE EXEMPTION AND THE STATUTE TO RELIGIOUS ORGANIZATIONS ON THE BASIS OF THE TRIPARTITE TEST USED FOR ESTABLISHMENT CLAUSE ANALYSES .. 16

Conclusion 19

Certificate of Service 20

TABLE OF AUTHORITIES

SUPREME COURT CASES: PAGE

Abington School District v. *Schempp*, 374 U.S. 203 (1963) 14

Adickes v. *Kress & Co.*, 398 U.S. 144 (1970) 9

Bolling v. *Sharpe*, 347 U.S. 497 (1954) 7

Braunfield v. *Brown*, 366 U.S. 599 (1961) 15

Brown v. *Board of Education*, 347 U.S. 483 (1954) 5

Burton v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) 6

Cantwell v. *Connecticut*, 310 U.S. 296 (1940) 5

Craig v. *Boren*, 429 U.S. 190 (1976) 8

Eisenstadt v. *Baird*, 405 U.S. 438 (1972) 5-6

Engle v. *Vitale*, 370 U.S. 421 (1962) 14

PAGE

Epperson v. *Arkansas*, 393 U.S. 97 (1968) 14

Everson v. *Board of Education*, 330 U.S. 1 (1947) 5

Gillette v. *United States*, 401 U.S. 437 (1971) 12

Graham v. *Richardson*, 403 U.S. 365 (1971) 6

Hirabayoshi v. *United States*, 320 U.S. 81 (1943) 7

Korematsu v. *United States*, 323 U.S. 214 (1944) 7

Kotch v. *Board of River Port Pilot Commissioners*, 330 U.S. 552 (1947) 6

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 17

Levy v. *Louisiana*, 391 U.S. 68 (1968) 6

Loving v. *Virginia*, 388 U.S. 1 (1967) 5

McCollum v. *Board of Education*, 333 U.S. 203 (1948) 14

McDaniel v. *Paty*, 435 U.S. 618 (1978) 8

McGowan Maryland, 366 U.S. 420 (1961) 6

McLaughlin v. *Florida*, 379 U.S. 184 (1964) 6

NAACP v. *Button*, 371 U.S. 415 (1962) 11

NLRB v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979) 11

Reed v. *Reed*, 404 U.S. 71 (1971) 6

Shapiro v. *Thompson*, 394 U.S. 618 (1969) 6

Sherbert v. *Verner*, 374 U.S. 398 (1963) 8

Skimer v. *Oklahoma*, 315 U.S. 535 (1942) 5

United States v. *Ballard*, 322 U.S. 78 (1944) 13

United States Department of Agriculture v. *Moreno*, 413 U.S. 528 (1973) 6

Walz v. *Tax Commission*, 397 U.S. 664 (1970) 14

PAGE

Williams v. *Rhodes*, 393 U.S. 23 (1969) 11

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 8

OTHER DECISIONS:

Benner v. *Oswald*, 592 F2d 174 (1979) 10

Golden v. *Biscayne Bay Yacht Club*, 521 F2d 344 (1975) 5

Heritage Village and Missionary Fellowship, Inc. v. *State of North Carolina*, 263 S.E.2d 726 (N.C. 1980) 18

Ohio v. *Whisner*, 351 N.E.2d 174 (1979) 11

Valente v. *Larson*, 637 F2d 562 (1981) 9

CONSTITUTIONS:

CONSTITUTION OF THE UNITED STATES:

First Amendment ..... passim

Fourteenth Amendment ..... passim

STATUTES:

Minnesota Statutes Sections 309.50-309.61 ..... 3, 4
309.515(1)(b) 4, 16, 17
309.52 18
309.53 18
309.533 18

MISCELLANEOUS:

Note, "Developments in the Law—Equal Protection" 82 Harvard Law Review 1065, 1076-1132 (1969) 6

Tribe, L., American Constitutional Law, (1979 Supplement) at pp. 78-79 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1666

JOHN R. LARSON, Commissioner of Securities, Minnesota Department of Commerce; WARREN SPANNAUS, Minnesota Attorney General; Individually and in their official capacities,

Appellants,

vs.

PAMELA VALENTE, LARRY BARBER, LARRY HAFT, KIMBERLY KORMAN, and HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY,

Appellees.

On Appeal from the
United States Court of Appeals for the Eighth Circuit

BRIEF OF THE CENTER FOR LAW RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN SUPPORT OF APPELLEES[1]

---

[1] The Center for Law and Religious Freedom of the Christian Legal Society files the within brief in support of appellee's legal arguments and the lower court decisions favorable to them. By the filing of this brief the Center for Law and Religious Freedom is not and should not be construed as endorsing any of the theological or philosophical beliefs and doctrines of the appellees.

INTEREST OF AMICUS CURIAE[2]

The Christian Legal Society is a non-profit Illinois corporation founded in 1961 as a professional association of Christian judges, attorneys and law students. Today it includes over 3,500 members throughout the United States. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect, promote, assure and enhance the freedom of Christians in the exercise of their faith which is guaranteed by the United States Constitution.

In accordance with its objectives, the Center for Law and Religious Freedom of the Christian Legal Society through its Advisory Board evalutes and defines constitutional issues, collects research data relating to those issues, and determines whether a particular issue is worthy of support. Its national membership and professional resources thus enable the Center for Law and Religious Freedom of the Christian Legal Society to focus public attention on unconstitutional incursions upon religious freedom that would otherwise go unrecognized. Because of its acute awareness concerning unconstitutional violations of the freedom of religion, it has increasingly become one of the nation's most effective and responsible commentators in this important field.

The Center has participated as amicus curiae in numerous legal and administrative proceedings. In pursuit of its goals, the Center also has held numerous regional

---

[2] The letters of consent of the parties to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2,

and national conferences providing continuing legal education by experts in fields which impact upon religious freedom.

This brief is filed to provide the Court with the views of amicus on aspects of the Equal Protection and Religion Clauses which amicus believes have not been adequately addressed to date.

STATEMENT OF THE CASE

Appellees (the Holy Spirit Association for the Unification of World Christianity and four members of the said church) instituted this action for declaratory judgment and injunctive relief respecting the Minnesota Charitable Solicitations Acts (Minnesota Statutes, Sections 309.50 - 309.61 (1980)), relating to the solicitation of funds from Minnesota citizens, as unconstitutional on its face and as applied. The United States District Court determined that the statute was unconstitutional due to unequal treatment under the Establishment Clause and held that the exemption granted by statute to some religious organizations under the said Act should be extended to all religious organizations. The United States Court of Appeals for the Eighth Circuit affirmed the basic holding of the District Court, that the exemption contained in the statute violated the Establishment Clause.

ARGUMENT

I.

THE CLASSIFICATION OF RELIGIOUS GROUPS IN THE MINNESOTA CHARITABLE SOLICITATIONS ACT CONSTITUTES INVIDIOUS DISCRIMINATION VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AND THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT REGARDLESS OF THE UNDERLYING INTENT OF THE MINNESOTA LEGISLATURE OR THE EFFECT OF THE SAID ACT.

The Minnesota Charitable Solicitations Act (Sections 309.50-309.61) at Section 309.515(1)(b) exempts religious organizations from parts of the Act, which have received "more than half of the contributions it received in the accounting year last ended (1) from persons who are members of the organization; or (2) from a parent organization or affiliated organization; or (3) from a combination of the sources listed in clauses (1) and (2)." The statute on its face divides religious organizations into two different classifications and thereby places different responsibilities, burdens and rights on the two classes. If the said exemption in the legislation was not intended to divide religious organizations into two classifications, why was it included?

A. The Equal Protection Clause Of The Fourteenth Amendment Is Applicable To All State Law.

The Fourteenth Amendment of the United States Constitution mandated that states grant the equal protection of the laws to all citizens. This Court has made the rights and privileges of the First Amendment applicable to the states through the Fourteenth Amendment. The same

prohibitions that prevent Congress and the federal government from establishing a religion or prohibiting the free exercise thereof are fully applicable to the states. *Everson* v. *Board of Education,* 303 U.S. 1 (1947), and *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940), respectively.

The Equal Protection Clause of the Fourteenth Amendment prohibits state action of every kind that operates to deny any citizen the equal protection of the laws. *Golden* v. *Biscayne Bay Yacht Club,* 521 F2d 344 (1975).

This Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. But it has also held many times that "invidious" distinctions cannot be enacted without a violation of the Equal Protection Clause. *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *Loving* v. *Virginia,* 388 U.S. 1 (1967).

In determining whether or not a state law violates the Equal Protection Clause, the Court must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942).

B. The Minnesota Charitable Solicitations Act Intrudes Upon A Fundamental Right Thus Making It Appropriate To Apply Strict Equal Protection Standards.

The Court has repeatedly held that the Equal Protection Clause of the Fourteenth Amendment, as much as the Due Process Clause, protects individuals against arbitrary state actions and forbids any classification which makes irrational distinctions between similarly situated persons or groups. *Eisenstadt* v. *Baird,* 405 U.S.

438, 446-47 (1972); *Reed* v. *Reed*, 404 U.S. 71, 75-76 (1971); *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U.S. 552, 556 (1947). The Court has established two distinct standards for determining whether a statute or rule violates the Equal Protection Clause.[3] In cases involving routine social or economic regulations, a classification is deemed valid unless it is purely arbitrary or "wholly irrelevant to the achievement of the State's objectives." *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961); *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 533 (1973). On the other hand, when the classification at issue is inherently "suspect" or when it affects "fundamental rights", the Court has applied a much stricter standard. In such cases, the Court has held that the classification, to be valid, must "promote a compelling governmental interest," *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969) (emphasis in original), or serve some "overriding" purpose. *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964). See also *Skinner* v. *Oklahoma*, *supra* at 541 ("strict scrutiny" of sterilization law required); *Levy* v. *Louisiana*, 391 U.S. 68, 71 (1968) (Court is "extremely sensitive" to classifications which affect "basic civil rights"); *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971) ("heightened judicial solicitude" is required for certain classes of persons); Note, "Developments in the Law — Equal Protection", 82 Harv. L. Rev. 1065, 1076-1132 (1969).

The Court has also held that "this strong policy (i.e. eliminating racial discrimination emanating from official

---

[3] The Equal Protection Clause, of course, applies to classifications created by governmental rule or policy as well as those created by statute. See e.g. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961).

sources in the States) renders racial classifications "constitutionally suspect," *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954); subject to the "most rigid scrutiny", *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944); and in "most circumstances irrelevant" to any constitutionally acceptable legislative purpose, *Hirabayoshi* v. *United States*, 320 U.S. 81, 100 (1943). In *McLaughlin* v. *Florida*, *supra* at 196, this Court said, "There is involved here an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race. Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy."

Unless a provision draws a classification which implicates fundamental personal rights or is based upon an inherently suspect distinction such as race, *religion*, or alienage, the classification will be upheld unless it can be shown that the classification is not rationally related to a legitimate state interest. (Emphasis added). *McGowan* v. *State of Maryland*, *supra* at 425-426. Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. *Brown* v. *Board of Education*, *supra*.

It is well settled that the religious freedom rights contained in the First Amendment are fundamental rights entitled to the utmost protection equal to any other fundamental right including freedom from racial discrimination. Amicus curiae submits that the stricter standard of equal protection analysis is applicable in

this case. The classification at issue here affects a "fundamental right," namely the religious freedom rights of the First Amendment. It is appropriate to apply the type of strict equal protection scrutiny that was set out by the Court in *Reed* v. *Reed, supra* and *Craig* v. *Boren*, 429 U.S. 190, 197 (1976) (the classification "must serve important governmental objectives and must be substantially related to the achievement of those objectives").

In *McDaniel* v. *Paty*, 435 U.S. 618 (1978), the subject of religious classification was addressed by Mr. Justice Brennan in a concurring opinion joined by Mr. Justice Marshall. He stated:

> Whether or not the provision discriminates among religions. . . it establishes a religious classification — involvement in protected religious activity . . . which I believe is absolutely prohibited.

Id. at 631-32. Mr. Justice Brennan went on to note that the Tennessee state constitutional provision in question in *McDaniels*, which barred "[m]inister[s] of the Gospel or priest[s] of any denomination whatever" from serving in public office, "imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity." *Id.* at 632. In discussing this case, Professor Tribe recently observed that "[b]ecause government may not constitutionally use religion as a basis for such burdensome classification, the law could not stand." L. Tribe, *American Constitutional Law*, 1979 Supplement, at pp. 78-79. Professor Tribe also pointed out that the plurality opinion of Chief Justice Burger required the State, in order to justify its attempted infringement on the appellant's religious activities, to prove "interests of the highest order." *Ibid.* at 79. Compare, *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972) and *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963).

In *Golden* v. *Biscayne Bay Yacht Club, supra,* the U.S. Court of Appeals said that, "Religious discrimination carries the same stigma of inferiority and badge of opprobrium that is characteristic of racial discrimination; thus, the well developed standards utilized in racial discrimination settings were applicable to both black and Jewish plaintiffs who had been applicants for membership in a private yacht club and had brought civil rights action wherein they alleged discriminatory admission policies of the club." The Court also stated the resulting "infringement upon religious freedom arising out of religious discrimination . . . was invidious religious discrimination violative of Equal Protection Clause of Fourteenth Amendment, as well as the Establishment Clause and Free Exercise Clause of First Amendment."

If a State had a law requiring a private person to refuse service because of race, it is clear beyond dispute that the law would violate the Fourteenth Amendment and could be declared invalid and enjoined from enforcement. *Adickes* v. *Kress & Co.,* 398 U.S. 144, 170 (1970). The same reasoning should be dispositive if a state enacted a law requiring religious discrimination either on its face or in its application since our religious freedom rights are in fact fundamental to our concept of liberty.

In the opinion of the United States Court of Appeals for the Eighth Circuit, *Valente* v. *Larson,* 637 F2d 562, 566, the Court took judicial notice in the absence of argument to the contrary from the state officials that real discrimination existed.[4] Amicus curiae contends that de

[4] The Court of Appeals also held that "the resulting discrimination is constitutionally invidious." *Valente, supra* at 568.

jure discrimination did in fact exist due to the fact that the Minnesota Charitable Solicitations Act discriminated on its face, against certain religious groups by exempting some but not all religious groups from portions of the reporting requirements.

The said exemption for religious organizations constitutes real discrimination by classification as well as opens the door for further discrimination by state regulatory bodies charged with implementing the discriminatory statute. It makes no difference whether appellees have demonstrated discrimination in the application of the statute by evidence or by intent to discriminate on the part of the legislature. Intent is present in that the statute contains an inherently suspect classification on its face.

As a result of this de jure discrimination, the statute is to be presumed constitutionally impermissible as a violation of the Equal Protection Clause of the Fourteenth Amendment unless the State is able to demonstrate a valid "compelling state interest."

C. Compelling State Interest Is Required In Order To Uphold A Statute Which Is Violative Of The Equal Protection Clause When Fundamental Rights Are Involved.

If an equal protection challenge involves a fundamental right or a suspect classification, state activity will be subject to strict judicial scrutiny and will prevail only if the state shows that such action is justified by a "compelling state interest". *Benner* v. *Oswald,* 592 F2d 174, (1979).

In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that "only a compelling state interest

in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP* v. *Button*, 371 U.S. 415, 438 (1962); *Williams* v. *Rhodes*, 393 U.S. 23, 31 (1969). The state interest needed when First Amendment freedoms are regulated must be (1) compelling, and (2) within the State's constitutional power to regulate.

The compelling state interest needed to nullify a claim of religious discrimination under the Equal Protection Clause of the Fourteenth Amendment or a violation of religious freedom under the First Amendment needs more than a mere rational relationship to some "colorable state interest." Only "the gravest abuses, endangering paramount interest" can permit limitation of free exercise. *Sherbert* v. *Verner*, supra, at 406 and *Wisconsin* v. *Yoder*, supra, at 215.

> "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religions." *Wisconsin* v. *Yoder*, supra, at 215.

A court should not accept "sweeping" claims but instead should "searchingly examine the interests that the state seeks to promote." *Id.* at 221. In *Yoder* the state's interest in its system of compulsory education and its interest in acting as parens patriae were insufficient. In *Sherbert* v. *Verner*, the integrity of a state unemployment compensation plan was not enough. In *Ohio* v. *Whisner*, 351 N.E.2d 750 (Ohio 1976), the state's interest in insuring certain minimum curriculum and faculty standards in private schools was inadequate. And from *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), it appears that the national labor policy of the federal gov-

ernment would not be weighty enough to permit interference with the operation of religious high schools. On the other extreme, the conscientious objector cases demonstrate that the nation's unassailable interest in self-defense and the efficient conduct of war are substantial enough to outweigh the religious liberty interest found in those cases. *Gillette* v. *United States,* 401 U.S. 437 (1971).

There has been no showing on the part of the appellants that the State of Minnesota had any "compelling state interest" which would justify such an invidiously discriminatory classification of religious groups as contained in the Minnesota Charitable Solicitations Act. The lower court, *Valente,* supra, at 567, stated that "No such sound and justifiable purpose can be found in the system of classifying religious organizations. On the contrary, as previously suggested, the exemption of organizations which conduct substantial public solicitations, if such solicitations account for less than half of the organization's income, appears to be designed to shield favored sects, while continuing to burden other sects. The classification has no ascertainable secular legislative purpose. . ."

In the Statement of the Case in Appellant's brief, p. 4, the purposes of the statute and the specific exemption are put forth. The purposes are "to provide information to Minnesota citizens for the purpose of making them more informed charitable donors and to protect them from fraud and misrepresentation." In light of the "compelling state interest" cases of this Court, mentioned supra, the interest of Minnesota in having "more informed charitable donors" or protecting them from "fraud and misrepresentation" (which is covered by existing civil and criminal statutes) can hardly be said to rise to the level of a compelling state interest.

The fact that there is or might be some fraud or misrepresentation in the solicitation and use of funds does not constitute justification of a statute which invidiously discriminates against religious organizations which are perceived, as evidenced by the statutory classification, to be involved in fraud or misrepresentation. This lack of justification is especially true when dealing with fundamental First Amendment rights. Justice Jackson in his well regarded dissent in *U.S.* v. *Ballard,* 332 U.S. 78, at 94-95 (1944) answered this fear and actually went beyond the majority in defending religious liberty even of groups with which he didn't agree.

> "Scores of sects flourish in this country by teaching what to me are queer notions. It is plain that there is wide variety in American religious taste. The chief wrong which false prophets do to their following is not financial . . . [T]he wrong of these things, as I see it, is not in the money the victims part with, half so much as in the mental and spiritual poison they get. But that is precisely the thing the Constitution put beyond the reach of the prosecutor, *for the price of freedom of religion* or of speech or of the press is that *we must put up with,* and even pay for, *a good deal of rubbish.*" (Emphasis added).

D. Government Is Required To Be Neutral In All Respects When Dealing With First Amendment Religious Freedoms In Order To Withstand A Challenge Of Violation Of Both The Equal Protection Clause And The Establishment Clause.

This Court has long recognized that the Establishment Clause calls for government neutrality in matters of religion, and that government hostility to religion, as well as government sponsorship of religion, can violate the Establishment Clause. Government in our democracy, state and national, must be neutral in matters of religious

theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of non-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. *Everson* v. *Board of Education, supra* 18; *McCollum* v. *Board of Education,* 333 U.S. 203 (1948); *Epperson* v. *Arkansas,* 393 U.S. 97 (1968) at 103-104.

Justice Harlan, discussing the goal of proper and acceptable relationships between government and religion, stated in his concurring opinion in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970):

> "Two requirements freely articulated and applied in our cases for achieving this goal are 'neutrality' and 'voluntarism.' E.g., see *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 305 (1963) (Concurring opinion of Mr. Justice Goldberg); *Engel* v. *Vitale,* 370 U.S. 421 (1962). These related and mutually reinforcing concepts are short-form for saying that the Government must neither legislate to accord benefits that favor religion over non-religion, nor sponsor a particular sect, nor to encourage participation in or abnegation of religion. Mr. Justice Goldberg's concurring opinion in *Abington,* which I joined, set forth these principles: 'the fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that *it effect no favortism among sects or between religion and non-religion, and that it work deterrence of no religious belief*'." 374 U.S. at 305. (Emphasis added).

This has been the interpretation of the great First Amendment which this Court has applied in many and subtle problems which the ferment of our national life

has presented for decision within the Amendment's broad command. *Epperson* v. *Arkansas, supra* 104.

Neutrality, according to Justice Harlan's view, "requires an equal protection mode of analysis." Here, there is no equal treatment. The Act on its face discriminates between religious organizations by dividing them into two classes and bestowing different rights, benefits and burdens to the two different classes. An attack founded on disparate treatment of "religious" claims invokes what is perhaps the central purpose of the Establishment Clause — the purpose of ensuring governmental neutrality in matters of religion. See *Epperson* v. *Arkansas, supra,* at 103-104.

At any rate, it is true that "the more discriminating and complicated the basis of classification for any exemption — even a neutral one — the greater the potential for state involvement" in determining the character of persons' beliefs and affiliations, thus "entangl[ing] government in difficult classifications of what is or is not religious, or what is or is not conscientious. *Gillette* v. *United States, supra,* at 457.

This Court held in *Braunfield* v. *Brown,* 366 U.S. 599, 607 (1961), that "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only *indirect.*" (Emphasis added).

Appellants continue to rely upon *Gillette* v. *United States, supra,* claiming that a statute with a valid secular purpose defeats an Establishment Clause challenge to it. As *Gillette* clearly stated, the complaint about the selective service conscientious objector exemption was that it "work[ed] a *de facto* discrimination among religions".

The Court pointed out that "The critical weakness of petitioners' establishment claim arises from the fact that Section 6(j), on its face simply does not discriminate on the basis of religious affiliation or religious belief, apart of course from beliefs concerning war." *Gillette, supra* at 450. In sharp contrast, Minnesota Stat. Ann. Section 309.515(1)(b) *expressly* divides religious organizations into two categories based on organizational structure and style of worship, a de jure discrimination among religions, which takes this case outside the *Gillette* "rule", even if, in light of subsequent cases, such a rule could be said to exist.

II.

ONCE IT HAS BEEN DEMONSTRATED THAT AN EXEMPTION TO A STATUTE HAS BEEN FOUND TO BE UNCONSTITUTIONAL, THE COURT MUST DECIDE THE APPLICABILITY OF THE EXEMPTION AND THE STATUTE TO RELIGIOUS ORGANIZATIONS ON THE BASIS OF THE TRIPARTITE TEST USED FOR ESTABLISHMENT CLAUSE ANALYSES.

Once it has been determined that the contested exemption amounts to an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment or violation of the Establishment Clause of the First Amendment, this Court must decide whether the exemption is to be broadened to include all religious organizations (as mentioned in *Valente, supra,* this would be in line with legislative intent) or to declare the exemption invalid leaving the statute intact under its severability provisions. If the Court decides that the exemption should be broadened, which amicus curiae suggests it should, then there is no need for any further action. However, if the exemption is stricken then the statute would be fully appli-

cable to all religious organizations. The tripartite test for Establishment Clause purposes must be used in determining whether or not the Act constitutes an establishment of religion under the First Amendment. Amicus curiae submits that the application of the Act to religious organizations does, in fact, violate the Establishment Clause.

Although the clauses of the First Amendment forbid two quite different kinds of governmental encroachment upon religious freedom, this court in *Engle* v. *Vitale, supra,* pointed out that unlike the Free Exercise Clause, the Establishment Clause does not depend upon any showing of *direct governmental compulsion and is violated by the enactment of laws which establish an official religion* whether or not those laws operate directly to coerce non-observing individuals.

This Court, having laid down the tripartite test in *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), must determine whether application of the Act, absent an exemption for religious organizations, amounts to an unconstitutional establishment of religion proscribed by the First Amendment.

For governmental action to withstand a challenge of violation of the constitutional prohibition against "an establishment of religion," the action (1) must have secular legislative purpose; (2) must have a "primary effect" that neither advances nor inhibits religion; and (3) must avoid excessive government entanglement with religion. *Lemon* v. *Kurtzman, supra* at 612.

The application of the Act to all religious organizations by disregarding the classification in the exemption (Section 309.515(1)(b)) may, amicus curiae concedes, have some secular legislative purpose in the prevention

of fraud and misrepresentation in all charitable organizations. However, the whole of the Act applied to all religious organizations in Minnesota is violative of the second and third prongs of the three-prong test.

The primary effect of the specific inclusion under the Act of all religious organizations amounts to an inhibition of religion. The reporting requirements by all churches and organizations whether large or small, would entail considerable expense and administrative time in securing an audit, completing the forms and otherwise burdening religion with additional governmental forms at the expense of individual ministries. The benefit that would be received by the State of Minnesota and her citizens is minute compared to the overwhelming burden on religion and the resulting inhibition.

However commendable as a sound business practice, such an audit does not spring full blown without considerable expense and administrative coordination. *Heritage Village and Missionary Fellowship, Inc.* v. *State of North Carolina,* 263 S.E.2d 726, 733 (N.C. 1980).

It is manifest that certain religious groups will suffer material burdens as result of the obligations imposed by the Act.

Likewise, the Act's reporting requirements create excessive entanglement between government and religion. All religious groups included in the Act must comply with the reporting requirements. The content of the report required includes intimate details of the religious organization, its activities, ministry and financial detail. (See Sec. 309.52 and 309.53). The commissioner is empowered to institute public or private investigations as well as serve subpoenas and take other evidence which "the commissioner deems relevant or material to the inquiry." (See Sec. 309.533)

CONCLUSION

The classification contained in the Minnesota Charitable Solicitations Act which distinguishes between religious groups constitutes a suspect classification and amounts to invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. The Court, by disregarding the invalid classification, should sustain the lower court's extension of the privileges of the exemption to all religious organizations. To do otherwise would constitute a violation of the proscription against the establishment of religion contained in the First Amendment.

Respectfully submitted,

ROBERT L. TOMS
611 West Sixth Street
Los Angeles, CA 90017
Tel: (213) 628-1300
Attorney for Amicus Curiae

Of Counsel:
THOMAS S. BRANDON, JR.
General Counsel
Center for Law and Religious Freedom
Post Office Box 2069
Oak Park, IL 60303
Tel: (312) 848-7735

Dated September 12, 1981

CERTIFICATE OF SERVICE

I, Thomas S. Brandon, Jr., certify that I have submitted forty copies of the foregoing Brief Amicus Curiae of the Center for Law and Religious Freedom of the Christian Legal Society in Support of Appellees, and mailed three copies to the Attorneys of Record, on September 16, 1981.

.....

THOMAS S. BRANDON, JR.

Post Office Box 2069
Oak Park, Illinois 60303